

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 24Apr2002

CASE NO. 2001-LHC-00357

OWCP NO. 01-150578

In the Matter of

DEAN E. OLSEN
Claimant

v.

WASHBURN & DOUGHTY ASSOCIATES
Employer

and

**MAINE EMPLOYERS' MUTUAL
INSURANCE COMPANY**
Carrier

Appearances:

James W. Case, Esquire (McTeague, Higbee, Case, Cohen,
Whitney & Toker), Topsham, Maine, for the Claimant

Richard F. van Antwerp, Esquire (Robinson, Kriger &
McCallum), Portland, Maine, for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Dean E. Olsen against Washburn & Doughty Associates (the Employer), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the Act). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the matter was referred to the Office of Administrative Law

Judges for a formal hearing which was conducted before me in Portland, Maine on June 27, 2001, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer and its insurance carrier, Maine Employers' Mutual Insurance Company (the Carrier). The Claimant and three witness called by the Employer and Carrier testified at the hearing, and documentary evidence was admitted without as Claimant's Exhibits CX 1-13 and Employer's Exhibits EX 1-3, 4 and 9. TR 6-13, 155.¹ In addition, Employer's Exhibits EX 5-7 were admitted over the Claimant's objections. TR 138-40, 237. At the close of the hearing, the record was held open to August 15, 2001 at the parties' request for the purpose of submitting written closing argument. TR 239. By agreement of the parties, the briefing deadline was extended to September 28, 2001. ALJX 6. Both parties missed their self-imposed deadline, the Claimant by one day (September 29, 2001) and the Employer and Carrier by two months (December 2, 2001), but did submit closing argument which I have considered. The record is now closed.

After careful analysis of the evidence contained in the record I have concluded that

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties offered the following stipulations at the hearing:

- (1) the Act applies to this claim;
- (2) the alleged date of injury is March 8, 2000;
- (3) there was an employer-employee relationship at the time of the alleged injury;
- (4) timely notice of the injury was given;
- (5) disability compensation was paid pursuant to the Maine Workers' Compensation Act, and the Employer is due a credit for such payments as an offset against any compensation awarded under the Act;
- (6) the informal conference was held on October 6, 2000;
- (7) the applicable average weekly wage is \$327.51; and

¹ Documentary evidence will be referred to herein as "CX" for an exhibit offered by the Claimant, "EX" for an exhibit offered by the Employer and Carrier, and "ALJX" for the formal papers. References to the hearing transcript will be designated as "TR".

- (8) the Employer provided the Claimant with 21 days advance notice by letter dated June 5, 2000 that it was reducing his disability compensation benefits under the Maine Workers' Compensation Act to \$132.80 per week effective June 27, 2000.

TR 7-8, 14-16, 92-94. The Claimant seeks temporary total disability benefits from March 8, 2000 to June 10, 2001 when he commenced alternative employment, and temporary partial disability benefits from June 11, 2001 to the present and continuing. TR 6-7. The Employer counter that the Claimant has not suffered any compensable disability since June 2000, and it contends that it has established that suitable alternative employment has been available to the Claimant since June 5, 2000. TR 16-19.

III. Summary of the Evidence

A. The Claimant's Testimony

The Claimant was twenty-five years old at the time of the hearing. He completed the eleventh grade in school and later obtained a G.E.D. He married after leaving school and has two dependent children. His first job after school was working as a stern man for about three years on his brother's fishing boat. He then went to work for about a year and a half as a lumber yard supervisor. This job involved manual labor, stacking lumber and operating a forklift. He left the lumber yard when the company went out of business, and he obtained a job as a forklift operator in a warehouse through a temporary employment agency. He was let go from the warehouse after approximately five months because he was no longer needed. During the Summer of 1999, he worked at an auto body shop in Portland, Maine. He also did some tuna fishing with his brother until he was hired by the Employer as a shipfitter on October 5, 1999. TR 23-26.

The Claimant testified that the Employer operates a shipyard in East Boothbay, Maine where tugboats are manufactured. His job as a shipbuilder involved assembly of the vessels' hulls by "tack welding" steel plates to steel girders. In addition to welding equipment, he used come-alongs, steel wedges and hammers. TR 26-29.

The Claimant further testified that in early March 2000, he was assigned to a new 11:00 p.m. to 6:00 a.m. shift. TR 29-30, 73.² On March 8, 2000, he was assigned to guide a thirty-foot steel girder, which was suspended from a crane, so that it could be attached at a right angle to another girder running the length of the vessel. To perform this task, the Claimant testified that he had to climb about 15 feet up on an aluminum ladder to reach the point where he was to weld the two girders together. TR 29-35. He stated that while he was on the ladder, the girder began to swing, so he grabbed onto the girder which twisted his upper body around and pulled him off

² It is noted that the Employer's personnel administrator testified that the Employer's night shift runs from 5:30 p.m. or 6:00 p.m. to 3:00 a.m. or 3:30 a.m. and that the Claimant was mistaken in his testimony that he was working an 11:00 p.m. to 6:00 a.m. shift on March 8, 2000. TR 165-66.

of the ladder. He eventually got his foot back on the ladder so that he was able to release the girder and descend the ladder. TR 35-36. At that point, the Claimant's brother-in-law, who was operating the overhead crane, came over and asked him what happened. The Claimant responded that he had "just shacked my back." TR 36, 74. He then sat down for the remaining ten minutes of the shift and went home to bed. TR 36-37. Aside from the Claimant, there apparently were no eyewitnesses to this incident. TR 75.

The Claimant testified that he was "pretty sore" by the time that he went to bed after returning home and that he could hardly move when he woke up because of pain in his lower back. He stated that he had never experienced pain in his low back like that before. He denied ever being seen by a chiropractor or other medical provider for low back problems and said that he had never missed work because of low back problems. His wife suggested that he should see a chiropractor, and she made an appointment from him later that day. TR 37. He was seen by chiropractor Debra Tillou who provided manipulative and electrical stimulation treatment, recommended that he remain out of work for two weeks and referred him to Dr. Dickens, his family physician. TR 38-39.

After his visit to the chiropractor, the Claimant contacted the Employer and advised that he would be out of work. TR 39. Within a few days, he was seen by Dr. Dickens who prescribed pain medication for his lower back. TR 40. According to the Claimant, he had severe pain in his lower back radiating into his buttock, and he was unable to find any comfortable position and was unable to lift his newborn child. TR 40-41. In addition to prescribing medication, Dr. Dickens referred the Claimant to Dr. Moran, an orthopedic surgeon. TR 41.

The Claimant saw Dr. Moran twice during the month of April 2002. He said that Dr. Moran recommended surgery and referred him to another surgeon, Dr. Anson. TR 41-42. He was seen by Dr. Anson who scheduled back surgery, but he did not report for the surgery because of fear which he attributed to a childhood history of multiple surgeries to correct club feet. TR 43-46. Instead, he continued to take Vicodin which had been prescribed by Dr. Dickens for pain and tried to let his back heal. TR 46. He continued to stay out of work and was receiving state workers' compensation benefits. TR 46-47.

The Claimant testified that in the period after he declined the back surgery recommended by Dr. Anson, he did a few small jobs in his brother's garage including a 20 minute welding job for which he was paid \$100.00. TR 47. He acknowledged that he had also done some cleaning in his brother's garage and moved a 14 foot fiberglass boat which was on rollers. TR 47-48, 82-83. He explained that he was on pain medication while he performed these tasks, some of which were surreptitiously videotaped by detective hired by the Carrier, and was able to function. TR 48. The Claimant testified that he went back to Dr. Anson around this time to complain about the condition of his back and financial situation, and he was given a prescription for an anti-depressant. TR 48-49. He also acknowledged going fishing with his father, another activity captured on videotape by the detective, and explained that his father taken him out to help him forget about his health and financial problems. He stated that he helped launch his father's 14 foot fiberglass fishing boat and later returned it to the trailer by operating a winch which he

described as a light task that could be performed by an eight year old. He also stated that his work at the Employer was much heavier than the tasks he performed on the fishing trip with his father. TR 49-52.

In June 2000, the Claimant received a telephone call from a representative of the Employer, Shawn Bucklin, who asked him about returning to work on light duty which had been recommended by Dr. Anson. He testified that Ms. Bucklin informed him that the light duty work would involve sweeping and picking up steel, tools and scrap. He refused the light duty offer, stating that he could not pick up steel and that it would not be safe for him to drive to work while he was on Vicodin. TR 51-52, 77-79, 87. The Claimant stated that Dr. Anson had told him that he should try to do some work. He said that Dr. Anson also wrote out a statement of what the Claimant could do and placed limits on his bending, twisting, pushing and pulling. TR 52-53. He was questioned about a listing of light duty cleaning jobs at the Employer which Dr. Anson had reviewed and released the Claimant to perform "as tolerated" (EX 2), and he testified that he could do the sweeping aspects of these jobs, but he could not have picked up pieces of steel and industrial debris for a full shift. He also stated that he did not feel that he could have safely worked in the Employer's industrial environment while using pain medication, but he felt that he could have worked on light duty in one of the Employer's tool rooms if that work had been offered to him. TR 53-56, 88-89. The Claimant returned to the Employer about two months later, on July 31, 2000, and stated that he was reporting for light duty. The Employer informed him that no light duty was available at that time. TR 83-84.

At some point after his telephone conversation with Ms. Bucklin, the Claimant testified that he received a telephone call from Dr. Anson who told him that he had seen a videotape and that he was terminating his physician-patient relationship with the Claimant because of what was depicted on the tape. TR 57-58. Following his discharge from Dr. Anson's care, the Claimant went back to his family physician, Dr. Dickens, and he was referred to a Dr. Phelps. TR 58. He testified that Dr. Phelps reviewed x-ray and MRI reports and examined him. He stated that he told Dr. Phelps that he was having pain in his lower back, more on the right, with radiation to his right leg and knee and occasional weakness in both legs which had caused him to fall once in his home. According to the Claimant, Dr. Phelps recommended that he undergo fusion surgery and referred him to Dr. Desai, a neurosurgeon. TR 59-62.

The Claimant testified that he saw Dr. Desai in August 2000 and had additional x-ray and MRI studies done. He said that Dr. Desai recommended some alternative treatment prior to any surgery because he could not guarantee improvement with surgery. TR 62-63. He returned to Dr. Desai in October 2000 and was referred to Dr. Blazier who administered injections in January and April 2001. TR 64. The Claimant testified that after an initial period of pain for about three days after the first injection, he experienced some pain relief which lasted for about three weeks. TR 65. He stated that the second injection on April 12, 2001 similarly provided him with relief after an initial few days of pain and that he continued to experience gradual improvement as his back "got a lot better." TR 66. He described his current back condition as "pretty good" overall with some occasional ache after work, but no pain, and he stated that occasional ache is nothing like the pain that he had before the injection treatment. TR 66-67.

According to the Claimant, Dr. Desai told him that he could go to work after the second injection treatment. TR 67-68. He looked for work at a video store, gas stations, a maritime farm and auto body shops. TR 70. Several of the jobs he applied for were listed in a labor market survey (EX 8) that had been compiled for the Employer and Carrier. TR 97-100. The Claimant was hired on June 11, 2001 by Hillside Collision where he was employed at the time of the hearing doing body work. TR 70-71. He testified that his job involves sanding but not a lot of lifting and bending. He works 40 hours per week at Hillside and earns \$8.00 per hour. TR 72-73, 90. However, he does not receive any benefits such as health insurance which was provided by the Employer, and he now relies on his wife's health insurance coverage. TR 100-101. He stated that he does have some aching in his back after working, and he said that his back is not the same today as it was before the March 8, 2000 injury. He testified that he could not return to his former job as a shipfitter at the Employer because of the lifting and crawling required, and he said that he would be working as a fisherman, earning \$300.00 per day, if his back today was in the same condition that it was before March 8, 2000. TR 71-73. Regarding his activities as depicted on the surveillance videotape, he testified that he was able to "scooch" (*i.e.*, squat) occasionally in June 2000 because this was more comfortable than bending at the waist, but he stated that he could not have performed these activities on a regular basis, five days per week for four or eight hours per day, as would have been required by the light duty job the Employer offered him in June 2000. TR 95-96.

B. Testimony of Carl I. Taylor and Video Surveillance of the Claimant

Mr. Taylor testified that he is a private investigator who was contracted by the Carrier to conduct surveillance on the Claimant in June 2000. TR 105-107. Pursuant to his contract with the Carrier, Mr. Taylor observed the Claimant's activities over the course of seven days between June 8, 2000 and June 17, 2000 for a total of approximately forty hours, and he submitted an investigative report (EX 5, 6) and videotape (EX 7). TR 107-110. He testified that the videotape contains a fair and accurate depiction of the Claimant's activities over the surveillance period. TR 137.

The surveillance videotape (EX 7), which was played during the hearing accompanied by narrative testimony from Mr. Taylor, begins on June 8, 2000 when the Claimant is shown on a shopping with his wife and infant child. In addition, the Claimant introduced records from his former treating physician, Philip S. Anson, M.D., an orthopedic surgeon who viewed the surveillance videotape and provided the following summary of the videotape's contents:

This shows an individual who I am fairly certain is Dean, based on appearance, initially through a sequence of getting in and out of a car, walking around outside WalMart, as well as inside a store, squatting down, sitting on his heels, and looking at what appears to be fishing equipment. This was followed by a short segment of going into an auto supply store, again getting in and out of a car very smoothly. There is only one short segment where he appears to be limping.

Following this was a long sequence outside of what appears to be an open door to a shop. It starts with the individual in question, along with another person, working on some sort of metal object. Although his back is toward the camera most of the time, and he is putting a welding visor on and off, using some type of an arc welder, he is bent over at the waist alternately with sitting down on his heels. There is certainly nothing that looks like any type of pain behavior. The other individual is using a grinder from time-to-time. It then moves on to the same scene on another day where two individuals appear to be working on a boat. Dean has been carrying a shop vac around with one hand, bending over, stooping, twisting and turning and also is bent over for quite some time reattaching the top of the shop vac. He has done some work leaning off to one side, working on the edge of what I think is a boat, leaning both to the left and to the right, and has been able to spend long periods of time bent over at the waist. Again, I have not appreciated anything that would look like he is uncomfortable or limited in his function in any way. In fact, there are at least two occasions where he moves rather quickly and clearly isn't protecting his back in any way as he bends forward or reaches out or across things to pick up or put down an object.

Later on in the afternoon, marked on the tape as June 14, 2000, at 3:48 p.m., the boat has been moved out into the driveway on some rollers. Dean is picking up the bow of the boat by himself and moves it another two or three feet out and then proceeds to turn it 180 [degrees] by himself.

The next sequence, labeled June 17, 2000, at 2:05 p.m., shows a boat on a trailer, being launched into the water and, again, an individual who appears to be Dean is shown pushing the boat off the trailer, getting up onto the bow on his knees in a crouch and going up and over the bow rail and then moving to the back of the boat, sitting in the rear seat, bending forward at the waist and putting a motor into the water and then maneuvering the boat over to a dock to pick up a passenger, using a small trolling motor, all the while remaining seated in the rear deck chair. This is followed by raising the trolling motor and lowering a small gasoline outboard and then starting it using a pull-rope, standing up and bent forward flexed at the hips and knees, followed by several sequences of fishing, all the while remaining seated. Images in this sequence change time from after 2:00 p.m. until after 7:00 p.m. This time change looks to be consistent based on lighting and shadows as well, and as seen in the surrounding scenery. Again, he is shown to be seated, is able to cast the fishing rod without any difficulty, and again I have not seen any evidence of anything that would suggest that he is having difficulty with his back.

The last sequence comes to a close after 9:00 p.m., bringing the boat back to the dock. It is difficult to determine exactly what is going on, but the individual appears to be dressed the same as Dean was earlier in the day. He is shown bending forward over the motor, facing backward but looking over his shoulder

forward, bringing the boat into shore. Much of the detail, however, is obscured secondary to the loss of daylight I was able to see, however, the boat being brought up onto the trailer in the light from the taillights of the vehicle and he is, again, seen very carefully and agilely getting off the boat, standing on the trailer tongue, leaning forward at the waist, and then pushing the boat away, pulling it back up onto the trailer to align it on the rollers. This sequence is done more than once, by himself without help of anyone else, alternating pushing and then lifting and pulling the boat forward onto the trailer, all the while remaining balanced on the tongue of the trailer to stay as dry as possible. He completes the loading by cranking the winch on the trailer, continually flexed forward at the waist, bent at knees and hips without taking any rest or standing up until the boat is firmly and fully loaded. This is followed by a single step up into the bed of a pickup truck with the time on the tape closing out this sequence at around 9:14 p.m. on June 17, 2000. This amounted to not quite 52 minutes of continuous viewing time on the VCR at the office, as well as my reviewing several sequences more than once, just to be absolutely certain of what the video tape was showing.

CX 1 at 8-9. Dr. Anson's summation of the surveillance videotape is consistent with my lay observation of the Claimant's recorded activities.

C. Testimony of Shawn Bucklin

Ms. Bucklin testified that she has been employed as a personnel administrator at the Employer since May 1999. In this capacity, she is responsible for coordinating light duty assignments for employees out of work for medical reasons. TR 148-49. She stated that the Employer had a light duty program in effect in June 2000 which included the list of light duty job descriptions that was sent to Dr. Anson who responded in early June that he approved all of the jobs on the list "as tolerated." EX 2; TR 149-50. After receiving Dr. Anson's response, Ms. Bucklin had the Employer's nurse call the Claimant who then called Ms. Bucklin on June 5. TR 150-51. She stated that the Claimant asked her what he would be doing on light duty, and she said that there was a list which had been cleared by Dr. Anson and which she would review with him when he came in to work. According to Ms. Bucklin, the Claimant said that he would not come in unless she told him what he would be doing, so she explained that he would be doing cleaning, general yard cleanup and bench work. She stated that the Claimant responded that he couldn't sweep and that he did not feel safe driving and working while on pain medication. She countered that Dr. Anson was aware of his pain medication and still wanted him to try light duty work, but the Claimant said that he was not coming in, that he could not do the work and that he did not care what the doctor said. TR 151.

Ms. Bucklin was questioned about light duty jobs at the Employer, and she stated that the Employer has two lunch rooms where employees on light duty clean, sweep, mop and wipe down tables. She also stated that employees on light duty clean bathrooms and do bench work where they can either sit or stand. TR 152. She further testified that employees on light duty are assigned to break up and throw cardboard boxes into a dumpster and shovel debris if they are able

to do so within their restrictions, but she stated that employees on light duty never work directly under boats under construction or repair. TR 153. Elaborating on the cleanup work done by employees on light duty, Ms. Bucklin testified that the employees sweep up welding rods, small pieces of steel, cups, debris, paper, dirt and a little bit of blasting grit. She continued that this debris is then picked up with a shovel or dust pan and deposited in five gallon pails, 55 gallon drums or directly into a dumpster. TR 157-58. She also testified that lifting on light duty would consist of the employee walking around with a five gallon bucket and picking up hard hats, knee pads and small hand tools, and she stated that the number of hours worked by employees on light duty varies according to the limitations identified by the employee's doctor. TR 160-61. Ms. Bucklin confirmed that she had viewed the surveillance videotape, and she stated that it was her opinion that the Claimant did more bending and stooping on the videotape than he would be required to do at the Employer in a light duty job. TR 160.

On June 8, 2000, Ms. Bucklin sent the Claimant a letter which forwarded the descriptions of the light duty jobs approved by Dr. Anson and asked the Claimant to contact her regarding his intentions to report for light duty. TR 153-54; EX 3. She stated that the Claimant never responded to this letter. TR 154. Ms. Bucklin stated that the Employer had light duty jobs available on June 8, 2000 and that light duty work continued to be available until the second week of July 2000 when there was a drop in production and the Employer began laying personnel off. TR 162. However, Ms. Bucklin added that had the Claimant accepted light duty work when it was offered in June 2000, the Employer would have continued to employ him on light duty for as long as he was medically able even after light duty work was otherwise eliminated in mid-June 2000. TR 162-64. She further testified that the Claimant came into the Employer on July 31, 2000 and said that he was reporting for light duty. He was informed that the Employer had no light duty work available at that time, and Ms. Bucklin sent him a letter dated August 10, 2000 confirming that no light duty work was available. TR 164-65; EX 4.

On cross-examination by the Claimant's attorney, Ms. Bucklin stated that the Employer did not have any employees on light duty at the time of the hearing and that the last employee to have a light duty job worked for about four months from October or November 2000 to February 2001. TR 168-69. Prior to that assignment, June 2000 was the last time the Employer had anyone working in a light duty job. TR 170-71. She explained that light duty jobs were not available after July 2000 when the Employer's production needs were reduced and able-bodied employees began doing the cleanup work. TR 174-75. Ms. Bucklin testified that the Claimant would have been assigned to cleaning lunch and bathrooms and some bench work had he reported for light duty work in June 2000. TR 177. She stated that the Employer would have started the Claimant in a light duty job for four hours per day and that he would have done general cleaning in the yard, but not in the production areas or "bays" where vessels are constructed. TR 177-78. Ms. Bucklin also stated that the cleanup duties performed by employees on light duty at the Employer require repetitive bending throughout the workday. TR 178-79. Finally, she acknowledged that the listing of light duty job descriptions sent to the Claimant (EX 2) refers to cleanup work under hulls, and she agreed that she had not told the Claimant that the Employer would not assign him to work under the hulls while he was on light duty. TR 181-85.

D. Medical Evidence

Records from the Claimant's primary care provider, John M. Dickens, M.D., indicate that the Claimant was seen in May 1996 for complaints of foot pain secondary to "grossly deformed feet, bilaterally." CX 3 at 21. In March 1997, he was seen for back and rib pain resulting from a fall at his home. *Id.* at 22. There are also a series of phone messages which appear to date from the Summer of 1998 when the Claimant contacted Dr. Dickens to request prescriptions for pain medication after reportedly injuring and re-injuring his back "while hauling traps." *Id.* at 19. In October 1998, Dr. Dickens conducted a pre-placement examination for the Employer and reported that the Claimant was medically qualified for employment as a shipfitter without accommodation. CX8 at 50.

Chiropractor Debra Tillou, D.C. saw the Claimant for back pain on March 9, 2000 at which time she completed a State of Maine Workers' Compensation Board Practitioner's Report (Form WCB M-1). She reported that the Claimant's condition was work-related, and she stated that the Claimant should be out of work until March 12 when he could return on restricted duty until March 22 with a lifting and carrying restriction to ten pounds. CX 9.

On March 14, 2000, the Claimant was seen by Dr. Dickens at the St. Andrew's Hospital in Boothbay Harbor, Maine. Dr. Dickens reported that the Claimant gave a history of injuring his back while at work on Friday, March 10, 2000.³ CX 8. His assessment was a lumbosacral strain with muscle spasm. *Id.* at 52. Dr. Dickens completed a MCB M-1 on which he reported that the Claimant's condition is work-related and that the Claimant would be unable to perform work activities and out of work until March 20, 2000. *Id.* at 53.

On March 16, 2000, the Claimant underwent lumbar x-ray studies which were interpreted by the radiologist as evidencing a forward subluxation of L5 on S1 and Grade II spondylolisthesis. CX 5 at 40. A CT scan at this time of the Claimant's abdomen and pelvis, which was apparently done to investigate his complaints of increasing abdominal and pelvic pain over the preceding three weeks, was normal. *Id.* at 39. After reviewing the lumbar x-ray report, Dr. Dickens referred the Claimant to Sean J. Moran, M.D., an orthopedic specialist. CX 3 at 27. Dr. Moran saw the Claimant on April 4 and April 25, 2000, and he did his own x-ray study which confirmed the finding of bilateral L5 spondylolysis with Grade II spondylolisthesis at L5-S1. CX 6. After an apparent consultation with the Claimant and a disability management consultant retained by the Carrier, Dr. Moran referred the Claimant to Dr. Anson for evaluation of surgery. CX 6 at 45; CX 1 at 1.

As the Claimant testified, Dr. Anson scheduled a surgical procedure for May 23, 2000, but the Claimant failed to appear, though Dr. Anson's notes indicate that he called the doctor's office on May 23 to reschedule the surgery. CX 1 at 2. On June 1, Dr. Anson reviewed a description of

³ This appears to be an error as the Claimant testified that he was injured on March 8, 2000, a Wednesday, and he was seen by Dr. Tillou on Thursday, March 9, 2002.

the Employer's light duty jobs and wrote that he approved "all & any on list as tolerated." EX 2. He also wrote, "I think it is reasonable for Dean Olsen to return to work at light duty for 4 to 8 hours a day as tolerated. He should at least attempt this prior to surgery." *Id.*

Dr. Anson's notes reflect that he spoke to the Claimant by telephone on June 4, 2000 and urged the Claimant to attempt to return to work at the Employer on light duty. He further suggested that the Claimant should at least report to work and see what the light duty job entailed, and the Claimant reportedly responded that he was uncomfortable with back pain and felt unable to do work which would require him to sweep and stand on concrete floors for long periods of time. CX 1 at 3. A follow-up note dated June 5, 2000 indicates that the Claimant called Dr. Anson after he decided not to report to the Employer for light duty. *Id.* at 4. At that time, Dr. Anson wrote in his notes that he was still evaluating the Claimant for possible surgery. *Id.*

Dr. Anson next saw the Claimant on June 16. He reported that his examination showed that the Claimant had a great deal of difficulty walking on his toes, bilateral positive straight-leg raise, pain with extension, and pain with palpation of the lumbosacral junction. He reported that he discussed the Claimant's failures to appear for surgery and light duty work and that the Claimant informed him that he was under stress, fearful of anesthesia and concerned about further injury to his back that if he returned to work. Dr. Anson also retracted his earlier approval of the Employer's light duty jobs:

As we went through the list of work light-duty at Washburn and Doughty, I don't see anything that would be straightforward. Anything that requires walking, any type of repetitive bending, and especially lifting, stooping, and picking up anything weighing over four to five lb. will definitely exacerbate his ongoing problem. I don't think that he would be able to satisfactorily do sweeping more mopping nor do I think it would be reasonable for him to even pick up light trash or to empty wastebaskets in an office setting. Much of these limitations are based on the fact that he has neurologic findings and has a problem that is known to be exacerbated by prolonged standing, as well as accompanied by relatively short sitting tolerance. The position of night watchguard was one potential possibility but, again, I'm not sure that he would be able to do this for a full eight hours, over a minimum of a 40-hour work week, especially with his present use of hydrocodone. Pain medication continued to be prescribed through Dr. Dicken's [sic] office as had been previously arranged. He estimates his usage at 6-7 tablets a day but notes that providers have discussed decreasing this to four to five times a day, if possible.

CX 1 at 5-6. Dr. Anson stated that the Claimant wanted to reschedule surgery, and he sent a WCB M-1 form to the Carrier, stating that the Claimant's diagnosis was unstable spondylolisthesis with bilateral L5 radiculopathy. He further stated that the Claimant needed surgery and that he was "unable to do any work at this time, including any of the light duty jobs

previously outlined at employer.” *Id.* at 7. However, Dr. Anson’s assessment abruptly changed after he viewed the surveillance film. On June 27, he wrote,

Based upon my review of this surveillance tape, assuming that the individual shown is Dean Olsen, it is my opinion that not only should he be able to do any and all of the light-duty jobs that were listed on the list that I was provided from his employer, I think it is also quite possible that he could do even heavier work from time to time. Clearly there was nothing that I saw, with the exception of some mild limping early on in the tape, that implied that the individual shown has any type of orthopedic problem.

Addendum: I have also reviewed his record this evening. Assuming that the dates on the video tape I reviewed are accurate, the span of time shown on the video tape corresponds to roughly the time that he was last seen in the office, on June 16, 2000. There clearly was a difference between the individual that I saw on the video tape and the individual that presented to me in the office. If these are one and the same, then I think It would be best, as noted above, for Dean to return to work and to not do anything with regard to scheduling surgery at this time. If he does continue, however, to complain of radicular symptoms, then EMGs and nerve conduction studies should be completed.

Id. at 9-10. Dr. Anson reported that he discussed the Claimant’s activities in the surveillance videotape with Drs. Dickens and Moran. *Id.* at 11-12. Dr. Anson’s notes state that, after several unsuccessful attempts to contact him, he reached the Claimant and his wife by telephone at 10:55 p.m. on July 3 and informed them that he was very concerned by what he had observed on the videotape. According to Dr. Anson, the Claimant denied any knowledge of a boat or doing any welding but admitted to fishing with his brother on one occasion when he was in a seat all of the time. Dr. Anson wrote that he also informed the Claimant that based on what he had seen on the videotape, he felt that the Claimant that he should be able to do just about all of the light duty jobs on the Employer’s list and, possibly, even heavier work. *Id.* at 14-15. On July 7, 2000, Dr. Anson advised the Claimant that he would no longer be able to provide medical care, and he suggested that the Claimant place himself in the care of another physician. *Id.* at 16. Office notes from Dr. Dickens confirm that he discussed the surveillance videotape with Dr. Anson on June 29, 2000 at which time he decided to no longer dispense any narcotic medication. CX 3 at 29-30.

Pursuant to Dr. Anson’s suggestion that he find another physician, the Claimant was referred by Dr. Dickens to another orthopedic surgeon, Robert N. Phelps, Jr., M.D. who first saw the Claimant on July 24, 2000. At that time, Dr. Phelps recorded that the Claimant gave a history of injuring his back while working at the Employer. The Claimant also acknowledged that he had been discharged by Dr. Anson after he had been videotaped fishing and doing welding work, and he explained that his father had taken him fishing to relieve depression over his back and that he had done the welding work while on pain medication because of pressing financial constraints. CX 7 at 47. After examining the Claimant and reviewing x-ray films and a lumbar MRI from April 2000, Dr. Phelps’s assessment was a Grade I spondylolisthesis and bilateral foraminal

stenosis with nerve root impingement. Dr. Phelps also concluded that this condition was work-related. He prescribed Vicodin and stated that this pain medication would preclude the Claimant from driving or working. *Id.* at 48. He recommended that the Claimant undergo an L5-S1 instrumented fusion by either Dr. Anson or a spine surgeon as he was not equipped to do this type of surgery at the hospital where he practiced. *Id.* at 48-49. As for the Claimant's work capacity, Dr. Phelps stated that he could perform sedentary work only with no bending, lifting and twisting and limited standing and sitting. *Id.* at 49. On July 31, Dr. Phelps recorded that he discussed the Claimant's case with Dr. Anson, who explained his reasons for not proceeding with surgical intervention, and he referred the Claimant to Dr. Desai for further evaluation and treatment. *Id.* at 50.

Rajiv D. Desai, M.D., a neurosurgeon, saw the Claimant for a neurological evaluation on August 14, 2000. He also reviewed the x-rays and lumbar MRI, noting a pronounced slip angle at the L5-S1 level with bilateral L5 spondylolytic defects in a grade 1, mobile, L5-S1 spondylolisthesis. He also noted the presence of bilateral foraminal narrowing as a result of the slip. His impression was (1) axial back pain secondary to work-related injury and L5-S1 spondylolisthesis/L5 spondylolysis and (2) hyperreflexia and mild gait abnormality consistent with myelopathy. CX 4 at 33. Based on his assessment, Dr. Desai made the following recommendations:

I advised him that the spondylolysis and spondylolisthesis seen on his films is a fairly common finding in the general population, particularly in those performing strenuous work or athletics. It is therefore difficult to ascribe his axial pain to this finding with certainty; however, the local tenderness and history that he provides, suggests that an acute disruption of a fibrous union at this level would be the likely explanation for his symptoms. It is unclear to me if a bone scan at this point would reveal whether or not the spondylolytic defects are acute, which would be further support for the onset of these problems. Though I believe it is quite likely he will come to surgery for this condition, I would favor an additional period of conservative management including aerobic exercise consisting of walking, swimming, physical therapy for low back strengthening and reconditioning, continuing his pain medications, smoking cessation, and clinical follow up.

Id. Dr. Desai also reported abnormal upper motor findings and recommended cervical and thoracic MRIs. *Id.* at 34. Dr. Desai's notes reflect that in October 2000, the Claimant reported no improvement with physical therapy and agreed to epidural steroid injection treatment. *Id.* at 35-36. Dr. Desai referred the Claimant to Kenneth L. Blazier, M.D. at the Mercy Hospital in Portland, Maine where he underwent epidural steroid injections on January 30, 2001 and March 12, 2001. CX 10. Following the second injection, Dr. Desai reexamined the Claimant on April 2, 2001, at which time he reported,

I saw Mr. Olsen back in the office in follow up today. He reports superb results following steroid injection and his back pain is essentially completely abated. He would like to return to work. His cervical MRI revealed no pathology either. He

has good range of motion and full strength. We discussed healthy behaviors for the future and that he does not have to worry about being at high risk of recurrent injury. He understands the types of signs or symptoms that should prompt re-evaluation here and I have advised him to feel free to call me for questions. He is very pleased with the results of his spontaneous recovery and agrees with this plan.

CX 4 at 38.

E. Vocational Evidence

The Employer and Carrier introduced a labor market survey which was prepared by vocational counselor Arthur M. Stevens, Jr., CDF. EX 8.⁴ The labor market survey covered the period July 1, 2000 through May 4, 2001 and is based on newspaper advertisements, Maine Job Service Listings and direct employer contacts. Jobs were identified at prospective employers located between 14 and 51 miles from the Claimant's home in Friendship, Maine. EX 8, Appendix A at 1. Specifically, Mr. Stevens identified 23 positions paying wages \$6.50 to \$20.00 per hour from direct employer contacts and 33 jobs paying wages between \$6.50 and \$16.00 per hour from newspaper advertisements. *Id.* at 4-5. He stated that all of these positions were consistent with Dr. Anson's June 27, 2000 description of the Claimant's physical capacities, and he concluded that a stable labor market existed in the Claimant's geographic area during the time period covered in the survey and that "based upon Mr. Olsen's previous work experiences, education level, physical capacity . . . , it is reasonable to expect that he could make at least \$7.00 per hour and as much as \$10.00 per hour to start in an entry level position." *Id.* at 6. The labor market survey contains a report entitled "Direct Employer Contacts and Employment Status" for 28 employers who were contacted in late April 2001 to early May 2001 and who provided information on current vacancies and hiring over the preceding six months and the qualification and physical requirements of various positions. *Id.*, Appendix C at 1-28. Eight of these jobs were analyzed during an on-site evaluation and observation of the physical requirements of the jobs. *Id.* at 29-44.

The Employer and Carrier called Mr. Stevens as a witness at the hearing. He testified that another individual, Tom Crimmins, a "certified career development coordinator" with his firm, made the direct employer contacts summarized in Appendix C to the labor market survey as well as the analyses of these jobs. TR 199, 205. He stated that his conclusion regarding the availability of suitable alternative is based on the job analyses, reviews of newspaper advertisements from July 2000 and the listing of jobs from the Maine Jobs Service. TR 211-13. He further stated that it was his opinion that the following jobs were all suitable alternative employment opportunities within the Claimant's physical limitations: an emergency dispatcher for

⁴ The "CDF" after Mr. Stevens's name is not identified in the record. His resume indicates that he has approximately 20 years experience in various vocational rehabilitation and counseling positions and earned a B.S. degree in human resource management in 2000, but it does not show that he has any special certification or license a rehabilitation counselor. EX 9.

the Knox County 911 Service; counter and delivery positions in automobile parts stores; clerk positions in hardware and paint stores; a sales position at a home improvement store; and security guard positions. TR 213. It was pointed out to Mr. Stevens that the Claimant had testified that he received two job offers as a result of applications he made to employers listed in the labor market survey, and Mr. Stevens stated that a 20% response rate was “impressive” and that it was his opinion that the Claimant could have found work earlier had he sought work. TR 214-15. On cross-examination, Mr. Stevens testified that he did not have any records from Dr. Dickens when he prepared the labor market survey. TR 223. Instead, he “combined” the reports from Drs. Anson and Desai to arrive at a basis for the Claimant’s physical capacities. TR 223, 227-28. He also stated that he was not aware of the fact that the Claimant was using prescription pain medication and did not take this medical information into consideration when determining what, if any, suitable alternative employment existed within the Claimant’s limitations. TR 229-30.

IV. Findings of Fact and Conclusions of Law

A. Injury and Causal Relationship to Employment

Thus, the Claimant must, as a threshold matter, establish that he suffered an “accidental injury . . . arising out of and in the course of employment.” 33 U.S.C. 902(2); *Bath Iron Works v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999) (*Brown*). As the proponent of an award of benefits under the Act, the Claimant bears the burden of persuasion by a preponderance of the evidence on all facts necessary to his claim. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 275-76 (1994). The Claimant is aided in this regard by section 20(a) of the Act which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The section 20 presumption “applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim.” *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976) (*Swinton*), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim “must at least allege an injury that arose in the course of employment as well as out of employment.” *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982) (*U.S. Industries*). A claimant presents a *prima facie* case by establishing (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Brown*, 194 F.3d at 4, citing *Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 959 (9th Cir.1998) and *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1986). *See also Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984); *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326, 331 (1981).

The Claimant testified that he injured his back while working for the Employer on March 8, 2002 when he was twisted from his position on a step ladder as he attempted to control a swinging steel girder. Although there is some question raised on this record regarding the actual hours of the Claimant’s shift on March 8, 2000, I find it significant that there is no discrepancy as to the essential details of the Claimant’s account of the accident as reflected in the reports from

the several physicians who questioned him about the history of the injury. Further, Dr. Desai reported without contradiction that the Claimant's symptoms are consistent with a traumatic injury such as he described on March 8, 2000.⁵ Therefore, based on my observations of the Claimant's demeanor at the hearing and the totality of this record, I find the Claimant's account of the events of March 8, 2000 to be credible, and I consequently conclude that he has successfully carried his burden of establishing a *prima facie* case that he suffered an injury arising out of and in the course of employment.

Where a claimant makes a *prima facie* showing of harm or pain and the existence of working conditions which could have caused or aggravated the harm or pain, the party opposing entitlement must produce substantial evidence proving the absence of or severing the presumed connection between such harm and employment or working conditions. *DelVecchio v. Bowers*, 296 U.S. 280, 286-287 (1935); *Sprague v. Director, OWCP*, 688 F.2d 862, 865-66 (1st Cir. 1982); *American Grain Trimmers v. Office of Workers' Compensation Programs*, 181 F.3d 810, 815-17 (7th Cir. 1999) (*Grain Trimmers*); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2nd Cir. 1981). While the Employer and Carrier have registered their skepticism by repeatedly referring to an "alleged" and "unwitnessed" injury, they have offered no evidence to sever the presumed connection between the harm suffered by the Claimant and his employment. Therefore, the presumed connection holds, and I conclude that the Claimant suffered an injury to his back on March 8, 2000 which arose in the course of his employment at the Employer's shipyard.

⁵ It is additionally noted that even if the Claimant's lumbar spondylolisthesis pre-existed the March 8, 2000 work-related event, a possibility apparently considered by Dr. Desai, I would nonetheless find that the Claimant suffered an injury within the meaning of the Act as credible evidence would establish that the Claimant's employment aggravated the pre-existing condition. *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir. 1981).

B. Nature and Extent of Disability

The Claimant alleges that he was temporarily totally disabled from March 8, 2000 to June 10, 2001 when he began working at Hillside Collision. He further alleges that he has been under a temporary partial disability since he began working at Hillside Collision. Relying on the surveillance videotape, Dr. Anson's revised physical capacity assessment after viewing the videotape and the labor market survey, the Employer and Carrier dispute the claim for any disability compensation after June 2000. Neither party contends that any disability suffered by the Claimant has become permanent which is consistent with the consensus medical opinion in this case that the Claimant has not reached a point of maximum medical improvement. *See Dixon v. John J. McMullen & Assoc.*, 19 BRBS 243, 245 (1986) (error for ALJ to find permanent disability where medical evidence indicated that injured worker's condition was improving and treating physician anticipated further improvement).

"Disability" is an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment" 33 U.S.C. §902(10). Thus, the concept of disability under the Act is economic as well as medical. *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). "The degree of disability in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, and the availability of that type of work which he can do." *American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970).

1. The Claimant's Ability to Return to His Usual Employment

Under the Act, the Claimant has the initial burden of proving that he can not return to his usual employment. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). A claimant's usual employment is defined as the regular duties the claimant was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). To determine whether the Claimant has carried his *prima facie* burden of establishing that he is unable to return to his usual employment, I must compare the medical opinions regarding his physical limitations with the requirements of his usual work as a shipfitter in the Employer's shipyard. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988).

The Claimant testified that his job as a shipbuilder involved assembly of tugboats by "tack welding" steel plates to steel girders. To perform this job, he used come-a-longs, steel wedges and hammers. It is clear from his testimony and that of Ms. Bucklin, the Employer's personnel manager, that the Claimant's job as a shipfitter required heavy manual labor including climbing ladders and regular bending and twisting. There is no question in this record that the Claimant has a significant condition involving his lower back, and that physicians have placed a varying range of limitations on his physical activities, at least during the period for which total disability compensation is claimed. The most optimistic assessment of the Claimant's physical capacities was written by Dr. Anson on June 27, 2000 after he had reviewed the surveillance videotape which led him to conclude that the Claimant could do all of the light duty jobs on the Employer's list and, possibly, do even heavier work from time to time. CX 1 at 9-10. On the other hand, Dr.

Phelps, who examined the Claimant in late July 2000, restricted him to sedentary work with no repetitive bending, lifting and twisting and only limited standing and sitting. CX 7 at 49. In my view, neither physician's assessment is compatible with the physical demands of the Claimant's shipbuilder job which clearly requires more than the possibility of occasional heavy work. More problematic is the period after April 2, 2001 when Dr. Desai released the Claimant to look for work after reporting that the Claimant had "superb results" from the second epidural steroid injection . . . good range of motion and full strength . . . [no need] to worry about being at high risk of recurrent injury." CX 4 at 38. Even though Dr. Desai did not identify any specific physical limitations, I find upon consideration of all of the medical evidence of record and noting that the Employer and Carrier do not contend that the Claimant could have returned to his regular, pre-injury duties as a shipfitter, that it would be irrational to interpret Dr. Desai's report as suggesting that he was releasing the Claimant to do any work without limitation. Moreover, the Claimant himself credibly testified that he still encounters some discomfort after working at the less physically demanding job at Hillside Collision. Accordingly, I find that the Claimant has successfully established on this record that he has been unable since March 8, 2000 to return to his usual employment as a shipfitter. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21 (1989) (noting that a claimant's credible complaints of back pain may be sufficient to carry the burden of proving inability to return to usual employment).

2. Suitable Alternative Employment

In view of my finding that the Claimant has established that he is unable to return to his former employment because of a work-related injury, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2nd Cir. 1991) (*Palombo*); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981) (*Gulfwide Stevedores*); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989). In view of the Claimant's limited educational background and work history of labor-intensive work, and considering the fact that he has a significant medical condition affecting his back, I conclude that the Employer must demonstrate the availability of actual jobs that the Claimant could realistically perform in order to carry its burden in this case. *C.f. Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 779 (1979) (rejecting "a mechanical rule . . . that the employer must always demonstrate the availability of an actual job opportunity whenever a claimant shows an inability to perform his previous work . . . [r]ather it is reasonable to require the employer to make such a strong showing when a claimant's inability to perform any available work seems probable, in light of claimant's physical condition and other circumstances such as claimant's age, education, and work experience . . . [but not] [w]here claimant's medical impairment affects only a specialized skill that is necessary in his former employment . . ."). Here, the Employer and Carrier assert that light duty jobs within the Claimant's limitations were available at the Employer's shipyard and that a significant number of other jobs, as shown in the labor market survey, were available in the vicinity of his residence.

a. The Employer's Offer of Light Duty Work

The Employer offered the Claimant a light duty assignment on June 5, 2000. An offer of light duty work within an injured worker's restrictions may satisfy an employer's burden to demonstrate the availability of suitable alternative employment provided that the work to be performed is necessary and not merely the creation of a beneficent employer. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986); *Swain v. Bath Iron Works Corp.*, 17 BRBS 145, 147 (1985). Based on Ms. Bucklin's uncontradicted testimony that the Employer had workers on light duty assignments until the second week in July 2000 when able-bodied workers began performing the light duty tasks as the Employer laid workers off due to a production slowdown, I find that the light duty job offered by the Employer was necessary and not a product of mere beneficence.

The Employer obtained Dr. Anson's approval of light duty work on June 1, 2000 and described the job's duties to the Claimant in a telephone conversation on June 5, 2000. In addition, Dr. Anson discussed the light duty job with the Claimant and encouraged him to report to the Employer to at least attempt to perform the job. On these undisputed facts, I find that the Employer made a *bona fide* offer of light duty work within the Claimant's restrictions for at least four hours per day beginning June 6, 2000. *C.f. Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984) (employer did not meet its burden where it sent the claimant a letter offering a light duty job but never discussed the specifics of the job with him). In finding that the Employer satisfied its burden of showing that a light duty job within the Claimant's restrictions existed at its shipyard, I have given little weight to Dr. Anson's June 16, 2000 retraction of his prior approval of light duty since he clearly rescinded that opinion on June 27 after viewing the surveillance videotape. I also give less weight to the restrictions later outlined by Dr. Phelps because he only saw the Claimant once and because there is no indication in the record that he had the same opportunity as Dr. Anson to observe the Claimant in the variety of activities depicted on the videotape. Finally, I place little reliance on the Claimant's assertion that he did not believe that he could safely drive to the Employer's shipyard and work in an industrial environment while using narcotic pain medication. Simply put, the claim of diminished work capacity due to pain killers loses much of its persuasive force in light of the fact that the Claimant is seen on the surveillance videotape driving a car, using an arc welding unit and operating an outboard motor during the relevant time period. *C.f. Diamond M Drilling Co. v. Marshall*, 577 F.2d 1003, 1007-09 (5th Cir. 1978) (proffered job which is inaccessible to the claimant because he can not physically handle a long commute is not suitable).

I recognize that because the Claimant refused the Employer's light duty offer, one can only speculate as to what might have happened had he reported to work as urged by Dr. Anson. He might have been able to perform the job, and it is even possible that he would have been able to work longer than the four hour shifts that Ms. Bucklin proposed to start him on. On the other hand, it is entirely possible that his back symptoms might have prevented him from even completing one day of light duty work. In my view, it is appropriate that the burden of any uncertainty be placed on the Claimant as the party responsible for creating the uncertainty. The Claimant has a "complimentary burden . . . of establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *New Orleans (Gulfwide)*

Stevedores v. Turner, 661 F.2d 1031, 1043 (5th Cir. 1981). The Claimant's burden includes the duty to cooperate with an employer's vocational rehabilitation specialist; *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 101-02 (1985), and it is appropriate for an ALJ to consider a claimant's disinclination to seek work in weighing the evidence. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 n.7 (1985).

Based on the foregoing, I conclude that the Claimant was not totally disabled from June 6, 2000 through July 14, 2000 (the end of the second week of July 2000) because the Employer has satisfied its burden of showing that a necessary light duty job was reasonably available and attainable for at least four hours per day. At the same time, I further conclude that the Employer has not demonstrated that light duty work would have been available to the Claimant after July 14, 2000.

b. Alternative Jobs

Based on the labor market survey, Mr. Stevens testified that it is reasonable to expect that the Claimant could make at least \$7.00 per hour and as much as \$10.00 per hour to start in an entry level position. He specifically testified that jobs as an emergency dispatcher for the Knox County 911 Service, counter and delivery positions in automobile parts stores, clerk positions in hardware and paint stores, a sales position at a home improvement store, and security guard positions are within the Claimant's limitations. I have carefully reviewed the labor market survey in light of Mr. Stevens's testimony with particular attention to the information regarding the qualification and physical requirements contained in the Direct Employer Contacts and Employment Status sheets and job analyses found in Appendix C to the survey report. Even using the most restrictive assessment of the Claimant's physical capacities from Dr. Phelps, I find that the following jobs are compatible with the Claimant's education, experience and physical limitations: (1) awake night monitor at Sweetser in Belfast Maine (no physical requirements, no lifting or carrying, and ability to sit or stand as needed; current opening on April 30, 2001 paying \$9.25 per hour to start, 40 hours per week; employer has hired for the same position in the past six months);⁶ (2) security officer at Pinkerton in Belfast and Rockland, Maine (no lifting and carrying with ability to change positions and sit, stand and walk; three current openings on April 30, 2001 paying \$8.00 to \$8.50 per hour to start, 30 to 40 hours per week with most positions 40 hours; employer has hired one other security officer in the past six months); (3) cashier at Wal Mart in Rockland, Maine (job requires no lifting and incumbent is able to change position from sitting to standing as needed; current full-time and part-time openings on April 30, 2001 and during the preceding six months paying \$7.00 and up); and (4) electronic assembler at Knox Semiconductor in Rockport, Maine (strictly bench assembly work on diodes weighing less than one pound with ability to change position from sitting to standing as needed; several full-time openings in May 2001 paying \$7.50 to \$8.50 per hour to start, 40 hours per week. I find that the

⁶ The survey indicated that the night monitor position pays \$10.25 per hour for the third shift. EX 8, Appendix C at 10. However, it is not clear that the job openings described are on this third shift. Therefore, I have used the lower \$9.25 per hour wage rate.

other jobs in the survey are not suitable due to lifting requirements, insufficient wage information or qualification requirements that would exclude the Claimant. In this latter regard, I have discounted the Knox County 911 emergency dispatcher job discussed by Mr. Stevens because the job description refers to pre-employment computer testing and a preference for applicants who are able to type in excess of 20 words per minute. EX 8, Appendix C at 1. Though the Claimant described his typing and computer skills as "average" in the employment he filed with the Employer (EX 1), there is no evidence that Mr. Stevens administered any testing to determine whether the Claimant could pass the pre-employment testing.

The average starting wage for the four jobs which I have found to constitute suitable alternative employment is \$8.00 per hour, and the labor market survey establishes that these jobs were available in April 2001 and during the preceding six months for 40 hours per week. Whether suitable jobs were available more than six months prior to April 2001 is unclear, apparently due to the methodology employed by the author of the survey who only looked back for a limited six month period. Having declined to engage in speculation regarding what might have transpired had the Claimant not refused the Employer's offer of light duty work, I will not do so here. On the evidence of record, I conclude that Employer and Carrier have made the requisite showing that full-time jobs paying \$8.00 per hour, \$320.00 per week existed in the Claimant's community between November 2000 and May 2001 and that the Claimant could have secured and successfully performed these jobs if he diligently tried. The Claimant ultimately returned to work in June 2001 earning \$8.00 per hour doing auto body work that is appreciably more physically demanding than any of the suitable alternative jobs, and there is no evidence in the record that he could not have performed any of these alternative jobs from November 2000 forward.

To reiterate, I find that the Claimant has established that he is unable to return to his usual employment as a shipfitter at the Employer's shipyard and that he is consequently entitled to temporary total disability compensation for periods of time when the Employer has not demonstrated the existence of suitable alternative employment. Those periods are March 9, 2000 to June 5, 2000 and July 14, 2000 to October 31, 2000. For the other periods covered by the claim, I have determined that the Employer has demonstrated that suitable alternative employment was and is available in the form of a part-time, light duty job from June 6, 2000 through the July 13, 2000 and in the form of full-time alternative jobs from November 1, 2000 to the present. Therefore, the Claimant's disability for these periods is at most partial, and any entitlement to compensation for those periods must be based, as discussed below, on a decrease in the Claimant's earning capacity. 33 U.S.C. §908(e).

C. Compensation Due and the Employer's Entitlement to Credits

Pursuant to section 8 of the Act, the amount of the Claimant's disability compensation must be determined with reference to his average weekly wage. 33 U.S.C. §908. In cases involving a traumatic injury, the average weekly wage is calculated as of the time of injury for which compensation is claimed. 33 U.S.C. §910; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 149 (1991); *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 104 (1991); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196, 200 (1989); *Del Vacchio v.*

Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 193 (1984); *Hasting v. Earth-Satellite Corp.*, 8 BRBS 519, 524 (1978), *aff'd in pertinent part*, 628 F.2d 85 (D.C. Cir.1980), *cert. denied*, 449 U.S. 905 (1980). In view of the parties' stipulation that the Claimant's alleged back injury occurred on March 8, 2000, I find that his compensation must be based on the stipulated average weekly wage of \$327.51 at the time of injury.

For the two periods of temporary total disability, March 9, 2000 to June 5, 2000 and July 14, 2000 to October 31, 2000, the Claimant is entitled to compensation equal to 66 2/3 per centum of his average weekly wages or \$218.34 per week. 33 U.S.C. §908(b). The periods of temporary partial disability are governed by section 8(e) of the Act which provides that where a claimant suffers a decrease in earning capacity due to a temporary partial disability, "compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years." 33 U.S.C. §908(e). "Wage-earning capacity" refers to an injured employee's "ability to command regular income as the result of his personal labor." *Seidel v. General Dynamics Corp.*, 22 BRBS, 403, 405 (1989), quoting 2 Larson, *The Law of Workmen's Compensation* §57.51 at 10-164.64 (1987). With regard to determinations of wage-earning capacity, section 8(h) of the Act provides,

The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h). Since the Employer has established the existence of suitable alternative employment for the periods of temporary partial disability when the Claimant was not working, I find it reasonable to use the wages established for the alternative employment to establish the Claimant's wage-earning capacity. See *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 42-44 (1996); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984). That the suitable alternative employment fairly and reasonably represents the Claimant's post-injury wage-earning capacity is confirmed by the fact the Claimant has been actually earning the same \$8.00 per hour wage since June 2001 when he commenced employment at Hillside Collision.

Between June 6, 2000 and July 13, 2000, light duty work was available for at least four hours per day. The parties have submitted weekly wage records (CX 11) but not the Claimant's

hourly rate, so I will assess his wage-earning capacity for this period at one half of his average weekly wage or \$163.76. Therefore, his compensation rate is 2/3 of the \$163.75 difference between his earning capacity and average weekly wage or \$109.17. For second period of temporary partial disability, November 1, 2000 to the present and continuing for the statutory maximum of five years, I will assess the Claimant's wage-earning capacity at \$320.00 per week. Pursuant to section 8(e), he is entitled to compensation at a rate of 2/3 of the \$7.51 difference between his stipulated average weekly wage and his post-injury earning capacity, or \$5.01 per week.

The parties have stipulated that the Employer is entitled to a credit for voluntary compensation payments made to the Claimant under the Maine Workers' Compensation Act. Section 3(e) of the Act provides in pertinent part that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this Act." 33 U.S.C. §903(e). Thus, under section 3(e), an "employer's payment of worker's compensation under a state statute discharges the employer's liability *pro tanto* under the Longshore Act." *Reich v. Bath Iron Works Corp.*, 42 F.3d 74, 76 (1st Cir. 1994). Accordingly, I find that the Employer is entitled to a credit in the amount of its compensation payments under the Maine Act.

D. Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). Interest is mandatory and can not be waived in a contested case. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734, 735 (1978); *Chandler v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 293, 296 (1978); *Ryan v. McKie Co.*, 1 BRBS 221, 230 (1974). Therefore, I conclude that the Employer is liable for payment of interest on any unpaid compensation.

The appropriate interest rate is the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

E. Medical Care

An Employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). The Employer has not disputed its liability to provide medical care. Accordingly, I find that the Employer is liable for all reasonable and necessary medical care as required by the Claimant for treatment of his March 8, 2000 work-related back injury, including the \$604.00 in medical bills itemized in the record at Claimant's Exhibit CX 12.

F. Attorney's Fees

Having successfully established his right to compensation, the Claimant's attorney is entitled to an award of fees under section 28(a) of the Act. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). The Claimant's attorney has filed an itemized application for attorney's fees and costs for work performed before the Office of Administrative Law Judges in the amounts of \$7,016.50 and \$585.43, respectively, for a total of \$7,601.93. The fees are based on hourly attorney rates of \$195.00 for the Claimant's lead attorney, \$145.00 for a junior attorney and \$65.00 for paralegals. The Employer has filed no objection to the fee application. Upon review, I find that the fee application complies with the requirements of 20 C.F.R. §702.132(a) and that the fees and costs requested are reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded.

V. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Washburn & Doughty Associates, shall pay to the Claimant, Dean E. Olsen, temporary total disability compensation pursuant to 33 U.S.C. §908(b) from March 9, 2000 to June 5, 2000 and from July 14, 2000 to October 31, 2000 at the rate of \$218.34 per week, subject to the Employer's credit pursuant to 33 U.S.C. §903(e) in the amount of payments of compensation under the Maine Workers' Compensation Act for the same injury;
2. The Employer shall pay the Claimant temporary partial disability compensation pursuant to 33 U.S.C. §908(e) from June 6, 2000 to July 13, 2000 at the rate of \$109.17 per week;
3. The Employer shall pay the Claimant temporary partial disability compensation pursuant to 33 U.S.C. §908(e) from November 1, 2000 to the present, and continuing for the statutory maximum of five years, or until further order, at the rate of \$5.01 per week;

4. The Employer shall pay the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

5. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related back injury may require pursuant to 33 U.S.C. §907;

6. The Employer shall pay to the Claimant's attorneys, McTeague Higbee, P.A., an attorney's fee in the amount of \$7,601.93 pursuant to 33 U.S.C. §928(a); and

7. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A
DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd